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No. 82-695

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,

vs.

CONSTRUCTION LABORERS VACATION TRUST
FOR SOUTHERN CALIFORNIA, et al.,
Appellees.

BRIEF AMICI CURIAE

On Behalf of the Boards of Trustees of the Carpenters Vacation and Holiday Trust Fund for Northern California, the Laborers Vacation-Holiday Trust Fund for Northern California, and the Cement Masons Vacation/Holiday Trust Fund for Northern California In Support of Position of Appellees

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On Behalf of the Boards of Trustees of the Carpenters Vacation and Holiday Trust Fund for Northern California, the Laborers Vacation-Holiday Trust Fund for Northern California, and the Cement Masons Vacation/Holiday Trust Fund for Northern California In Support of Position of Appellees

This brief as *amici curiae* is submitted on behalf of the Boards of Trustees of the Carpenters Vacation and Holiday Trust Fund for Northern California, the Laborers Vacation-Holiday Trust Fund for Northern California and the Cement Masons Vacation/Holiday Trust Fund for Northern California (herein the "Northern California Funds") with the written consent of the Appellant and the Appellees. The written consents are being filed with this brief in the office of the Clerk.

NATURE OF THE INTEREST OF THE NORTHERN CALIFORNIA FUNDS

Each of the Northern California Funds is a joint labor-management trust established by collective bargaining between employers and unions in the building and construction industry in conformance with the requirements of Section 302(c)(6) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(6). Each Fund is an employee welfare benefit plan covered by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, commonly known as "ERISA."

The Northern California Funds are similar to the Appellee Construction Laborers Vacation Trust for Southern California in all respects material to this appeal. The Trust Agreement establishing each Fund contains anti-alienation provisions substantially identical to the anti-alienation provisions of the Trust Agreement establishing the Appellee Fund.

The anti-alienation provisions of the Northern California Fund Trust Agreements are supplemented by other provisions making clear that the purpose of the prohibition against alienation is to preserve intact the money contributed to the Funds by individual employers for the sole purpose of providing paid vacations and holidays to covered employees.

Section 1 of Article III of the Trust Agreement establishing the Carpenters Fund provides:

> "The Plan is established for the benefit of the Employees and the objective of the Plan is to provide such Employees with paid vacations and paid holidays from work, thereby allowing the Employee to return to his work refreshed and reinvigorated and securing to the Individual Employer the performance of better and more efficient work. The restrictions imposed by the Plan upon the use and enjoyment by the Employ-

ees of the moneys contributed by the Individual Employers are for the purpose of accomplishing this objective, and are voluntarily assumed and agreed to by the Employees for this purpose."

Section 7 of Article V of the same Trust Agreement provides:

"It is the intent and purpose of the Plan, and of this Agreement, and a material part of the consideration for the making of Contributions to the Fund by Individual Employers, that the money in each vacation and holiday account shall be received by the Employee entitled thereto personally and shall in fact be used by him personally to enable him to take a bona fide vacation and holiday from work, and for no other purpose. Accordingly, no Contributions due the Fund, and no moneys in vacation and holiday accounts established pursuant to the Plan, shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge by any Employee or any other person, except as provided in Section 4 of Article IV, and any such anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge shall be void and ineffective. The money credited to a vacation and holiday account shall only be subject to withdrawal at the times, in the manner and for the purposes specified in this Agreement."

Section 1 of Article III and Section 5 of Article IV of the Laborers Fund Trust Agreement and the Cement Masons Fund Trust Agreement contain substantially identical provisions.

The sums contributed to the Northern California Funds are substantial and they impose a heavy responsibility upon the Boards of Trustees of the Funds to protect the

contributed moneys from diversion to purposes other than vacations and holidays. During the work year 1981-82 over $36,000,000 was contributed to the Carpenters Fund by more than 3300 individual employers, and was entrusted to the Board of Trustees of the Fund for distribution to more than 32,000 carpenters for paid vacations and holidays during 1983. During the same work year, over $24,000,000 was contributed to the Laborers Fund by more than 2200 employers and over $4,500,000 was contributed to the Cement Masons Fund by more than 700 employers, for distribution at the commencement of the vacation year to more than 16,000 laborers and more than 3200 cement masons, respectively.

Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), requires the Board of Trustees of each Fund to discharge its fiduciary duties with respect to the plan "solely in the interest of the participants and beneficiaries and—

> (a) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries, and
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> (ii) defraying reasonable expenses of administering the plan;
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> * * * * *
>
> and;
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> (d) in accordance with the documents and instruments governing the plan insofar as such documents and instrument are consistent with the provisions of" Title I of ERISA.

Section 409(a) of ERISA, 29 U.S.C. § 1109(a), provides that "any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title [Title I] shall be personally liable to make good to such plan any losses

to the plan resulting from each such breach . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary."

Each of the Funds, like the Appellee Fund, has been served with Notices to Withhold by the Appellant Franchise Tax Board. It is vitally important to the Board of Trustees of each Fund, therefore, to know whether or not it is prohibited by federal law from honoring such notices.

ARGUMENT

I

Federal law prohibits the diversion to State tax obligations of money contributed by employers to a trust fund pursuant to a collective bargaining agreement for the sole and exclusive purpose of providing paid vacations and holidays to their employees

Section 302 of the Labor-Management Relations Act, 29 U.S.C. § 186, prohibits the establishment and continued existence of trust funds, such as the Appellee Fund and the Northern California Funds, unless the trust funds comply strictly with the requirements of subsection (c)(6) of that Section. Subsection (c) (6) permits such trust funds only if the money paid to the funds is "for the sole and exclusive benefit of employees" of the employers contributing to the funds, "and their families and dependents," and only if the funds are established "for the purpose of pooled vacation, holiday, severance or similar benefits."

The diversion to the Franchise Tax Board for tax purposes of money contributed by employers to a trust fund for the exclusive purpose of providing paid vacations and holidays to their employees violates two key aspects of the prohibitions of Section 302.

Firstly, it makes available to an outsider moneys which Congress intended to be used only for the benefit of em-

ployees of the contributing employers and their families and dependents.

In condemning a violation of this congressional intent, the Court, in the landmark case of *Blassie v. Kroger Company* (8th C.A. 1965) 345 F.2d 58, said (pp. 75-76):

> "**The pharmacy and its availability to outsiders.** Only Blassie and Etzel appeal as to this. The Trust's Saint Louis building which houses its Medical Institute contains space for a pharmacy. The Trust leased this space and fixtures to two brothers. The lessees operate the pharmacy but are obligated to make drugs available to trust beneficiaries on a cost plus basis. This effects a substantial savings for the customer. **The favorable patronage, however, has not been restricted to beneficiaries of the Trust.** Instead, it has been made available to members of three other unions and perhaps other persons connected with the Trust.
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> "**The district court held that the Trust is one solely for the benefit of the trust beneficiaries and that the pharmacy's availability to outsiders violates the statute.**
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> "We agree with the reasoning of the district court. **The Trust and its assets are solely for the benefit of its beneficiaries.** We see nothing violative of § 302(c) or of the trust agreement in the trustees' insistence that the lessees furnish drugs to trust beneficiaries at a reduced price. At the same time, we see nothing legal in a direction by the trustees, through contract or otherwise, that this favorable arrangement be extended and made available for non-beneficiaries, such as union members who are not covered employees, members of other unions, or an outsider of any kind.
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> • • • • •

"We realize that there will be difficulties in enforcement here and that there are easy ways for a beneficiary or a pharmacist, or others, to get around the restriction. Nevertheless, the principle exists. This is a trust, with all the implications which that term possesses. **The trustees may not, directly or indirectly or through the lessees, by contract, rebate, insufficient rent, dictation, pressure, or in any other manner, afford benefits to outsiders which belong exclusively to the beneficiaries.**"[1]

Secondly, the diversion of the moneys to the Franchise Tax Board would require that such moneys be used for a purpose which is not permitted by any of the exemptions in Section 302.

In holding that such a result violates Section 302, the Court, in *Local No. 2, etc. v. Paramount Plastering, Inc.* (9th C.A. 1962) 310 F.2d 179, said (pp. 186-191):

"This court can believe that Congress might well have, or even should have, provided additional exemptions, permitting the setting up of laudable trusts that are vital to the preservation of the economic position of both labor and management, yet this court cannot be the arbiter of what such exemptions should be. That is the duty and responsibility of Congress. As Judge Yankwich ruled: **Congress proscribed certain practices and permitted others in labor-management agreements, and permitted 'joint trust funds for certain purposes only.'**

* * * * *

"We conclude that the evidence in this case clearly establishes that the three trusts (Industry Program, Labor-Management Relations Trust, and the Institute Trust) as well as the succeeding corporate entity, are

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[1]Throughout this brief emphasis is added unless otherwise indicated.

severally 'representative' of employees as that term is used in § 302(a) and (b); and that the purposes, powers and functions of the trusts and corporation here involved are not within the exemptions created by Congress, **and are not permissible objects for the use of joint trust funds.**

"We do not quarrel in the slightest with the laudable objectives of the trust amicably created by labor and management in this case. We sympathize with the efforts of both labor and management to solve a vexing industry problem. But like so many of such present day problems, our duty is to rule in accordance with that which the 'Congress in its wisdom' has seen fit to enact. **We cannot widen the door when the door sill has been carefully tailored by the representatives in Congress. The relief sought by the appellants herein must be found in congressional and not judicial action.**"

When Congress amended Section 302 in 1959 to add an exemption permitting the establishment of collectively bargained funds for pooled vacation and holiday purposes (see *Local No. 2, etc. v. Paramount Plastering, Inc., supra,* at p. 186), it had specifically in mind the transitory nature of employment in the building and construction industry and the special problems this type of employment presented for both employers and employees in the industry (U.S. Code Cong. and Adm. News, pp. 2318, 2344-2345; see *Contractors, Laborers, Teamsters Health and Welfare Fund v. Associated Wrecking Company* (8th C.A. 1981) 638 F.2d 1128, 1131). Since building tradesmen "work for many different employers on different jobs over a relatively short period of time," the best if not the only practical way to provide them with paid vacations and holidays is to handle such benefits "through a central fund with contributions based upon the hours they work for particular employers" (see *Denver Metro. Assn. v. Journeyman Plumbers* (10th C.A. 1978) 586 F.2d 1367, 1371; *cf. Associated Builders &*

Contractors v. Carpenters Vacation and Holiday Trust Fund for Northern California, C.A. 9th, Nos. 81-4122, 81-4359, 81-4687, March 10, 1983, filed opinion, pp. 8-9, 11). Such central funds however, present easy and readily available targets for those who, like the Appellant Franchise Tax Board, seek to divert the funds to purposes which they consider laudable but which have not been sanctioned by Congress.

Like the Court in *Paramount Plastering*, we do not quarrel in the slightest with the laudable objectives of the Appellant Franchise Tax Board. The protection of the public fisc, and the collection of taxes owed to the State by its citizens, is an important public purpose. The provision of paid vacations and holidays to wage earners, however, is also a laudable objective.

In *Lines v. Fredericks* (1970) 400 U.S. 18, 91 S.Ct. 113, this Court held that a bankrupt wage earner's vacation pay, accrued but unpaid at the time of filing his petition, did not pass to the trustee in bankruptcy as "property" under the Bankruptcy Act. The Court said (400 U.S., at pp. 19-20, 91 S.Ct., at pp. 113-114):

> "The most important consideration limiting the breadth of the definition of 'property' lies in the basic purpose of the Bankruptcy Act to give the debtor a 'new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt. . . .'
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> "Applied to the set of facts before us here, the principles reflected in the earlier cases compel a decision for the bankrupt. . . . [T]he respondents here are wage earners whose sole source of income, before and after bankruptcy, is their weekly earnings. **The function of their accrued vacation pay is to support the basic requirements of life for them and their families during**

brief vacation periods or in the event of layoff. Since it is a part of their wages, the vacation pay is 'a specialized type of property presenting distinct problems in our economic system,' Sniadach v. Family Finance Corp., 395 U.S. 337, 340, 89 S.Ct. 1820, 1822, 23 L.Ed.2d 349. Where the minimal requirements for the economic survival of the debtor are at stake, legislatures have recognized that *protection that might be unnecessary or unwise for other kinds of property may be required.* See, e.g., the Consumer Credit Protection Act, § 301, 82 Stat. 163, 15 U.S.C. § 1671 (1964 ed., Supp. V).

"The wage-earning bankrupt who must take a vacation without pay or forego a vacation altogether cannot be said to have achieved the 'new opportunity in life and [the] clear field for future effort, unhampered by the pressure and discouragement of preexisting debt,' Local Loan Co. v. Hunt, supra, which it was the purpose of the statute to provide."

The objective of the 1959 amendment to Section 302 was to protect the interests of wage earners in paid vacation and holidays articulated by this Court in the *Lines* case. Congress achieved this objective by requiring that money contributed by employers to collectively bargained trust funds to provide vacation and holiday benefits for their employees must be used for the sole and exclusive benefit of such employees, their families and dependents, and solely for vacation and holiday purposes. If any part of the moneys so contributed is to be diverted pursuant to state law to the benefit of other persons and for other purposes, Congress must amend the statute further to permit such diversion.

Congress has not amended Section 302 to permit the diversion sought to be enforced by the Appellant Franchise Tax Board. Instead, it has enacted ERISA, 29 U.S.C. § 1001, *et seq.*, which incorporates and strengthens the re-

strictions against the diversion to outsiders of vacation and holiday benefits intended exclusively for employees, their families and dependents.

Like Section 302 (c), ERISA requires that an employee vacation and holiday plan be established and maintained pursuant to a written instrument. (Section 402(a)(1), 29 U.S.C. § 1100(a)(1)). As the Conference Committee explained, "[a] written plan is to be required in order that every employee may, on examining the plan documents, determine **exactly what his rights and obligations are under the plan.**" (*Legislative History of ERISA*, p. 4564).[2]

ERISA also extends to every covered employee benefit plan the requirement that the assets of the plan "shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan" (Section 403 (c)(1), 29 U.S.C. § 1101(c)(1)). And to emphasize this requirement, ERISA provides that a fiduciary of a covered plan "shall discharge his duties with respect to a plan *solely* in the interest of the participants and beneficiaries and (A) for the *exclusive* purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan; . . . and (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I]." (Section 404(a)(1), 29 U.S.C. § 1104(a)(1)).

The plain meaning of these provisions is that money contributed by employers to an employee benefit plan covered by ERISA must be used for the purposes provided in the plan and cannot be diverted to other purposes, either by requirements of State law or by other means. And where requirements of State law are concerned, ERISA is em-

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[2]Committee Print, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974, Public Law 93-406.

phatic that with limited exceptions, none of which are pertinent here, such requirements are superseded insofar as they may now or hereafter relate to a covered plan (Section 514(a), 29 U.S.C. § 1144(a)).

In pressing its argument that "[t]here is no section of ERISA which prohibits the Board from levying on a welfare or vacation fund" (Brief of Appellant, p. 32), Appellant Board ignores one of the basic grounds for this Court's decision in *Alessi v. Raybestos-Manhattan, Inc.* (1981) 451 U.S. 504. There the Court said (pp. 525-526):

> "Another consideration bolsters our conclusion that the New Jersey provision is preempted insofar as it bears on pensions regulated by ERISA. ERISA leaves integration, along with other pension calculation techniques, subject to the discretion of pension plan designers. See *supra,* at 1903-1905. Where, as here, the pension plans emerge from collective bargaining, the additional federal interest in precluding state interference with labor-management negotiations calls for preemption of state efforts to regulate pension terms. See *Teamsters v. Oliver,* 358 U.S. 283, 296, 79 S.Ct. 297, 304, 3 L.Ed. 2d 312 (1959). **As a subject of collective bargaining, pension terms themselves become expressions of federal law, requiring preemption of intrusive state law.**[23]"

In footnote 23, the Court said (p. 526):

> "23. This conclusion follows naturally from the view of a plurality of this Court in *Malone v. White Motor Corp.,* 435 U.S. 497, 98 S.Ct. 1185, 55 L.Ed. 443 (1978). There, because Congress preserved a state role in pension regulation before ERISA, the plurality created an exception to the general rule preempting state regulation of collective bargaining. Id, at 513-514, 98 S.Ct. at 1194-1195. **This exception no longer applies, however, now that ERISA, with express preemptive intent, has eliminated state regulations of most pension plans.**"

The Court has not confined its holding in *Alessi* to *pension* trusts, as Appellant suggests (Br., p. 34). In *United Mine Workers of America Health and Retirement Funds v. Robinson* (1982) 455 U.S. 562, which involved an employee *welfare* benefit plan, the Court said (pp. 573-575):

> "The petitioner trustees were not given 'full authority' to determine eligibility requirements and benefit levels, for these were fixed by the 1974 collective bargaining agreement. By the terms of the trust created by that agreement, the trustees are obligated to enforce these determinations unless modification is required to comply with applicable *federal* law . . . . Absent conflict with *federal* law, then, the trustees breached no fiduciary duties in administering the 1950 Benefit Trust in accordance with the terms established in the 1974 collective bargaining agreement.
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> • • • • •
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> "The substantive terms of jointly administered employee benefit plans must comply with the detailed and comprehensive standards of the ERISA . . . **But where neither the collective bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective bargaining contract.**"

The anti-alienation provisions of the trust agreement establishing the Appellee Fund were included in the agreement to assure compliance with the direction of Congress that money contributed by employers to collectively bargained trust funds to provide vacation and holiday benefits for their employees must be used for the sole and exclusive benefit of such employees, their families and dependents, and solely for vacation and holiday purposes (see *supra.*, p. 10). Thus, in the words of this Court in *Alessi*, such provisions are "expressions of federal law, requiring preemption of intrusive state law."

The intrusive nature of state law where vacation benefit plans governed by ERISA are concerned is illustrated by the California Employees' Earnings Protection law (California Code of Civil Procedure, §§ 723.010-723.154, revised effective July 1, 1983, as §§ 706.010-706.154).

Under California law, and under the trust agreements establishing the Appellee Fund and the Northern California Funds, vacation benefits are "additional wages for services performed (*Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, 779, 647 P.2d 122; see *Associated Builders & Contractors v. Carpenters Vacation and Holiday Trust Fund for Northern California, supra,* filed opinion, p. 10).

The California Employees' Earning Protection Law provides that except as provided in Section 4701 of the Civil Code [dealing with a wage assignment for support], the earnings of an employee shall not be required to be withheld by an employer for payment of a debt by means of any judicial procedure other than pursuant to that law (California Code of Civil Procedure § 723.020; revised § 706.020) and defines the term "employer" as meaning "a person for whom an individual performs services as an employee" (*ibid* § 723.011(c); revised § 706.011(c)). The law provides that no levy upon earnings of an employee held by an employer is effective unless such levy is made in accordance with the provision of the law (*ibid* § 723.071; revised § 706.071); provides that a withholding order for taxes may only be issued under specified circumstances (*ibid* § 723.072(b); revised § 706.072(b)); requires that within ten days after service of the order, the employer deliver to the taxpayer a copy of the order, and a notice in a form provided by the state advising the taxpayer of the effect of the order and of his right to hearings and other remedies under the law (*ibid* § 723.075(b); revised § 706.075(b)); and provides that while the employer is not

subject to any civil liability for a failure to deliver the required documents to the taxpayer, nothing in the law limits the power of a court to hold the employer in contempt of court for such failure (*ibid* § 723.075(d); revised § 706.075(d)).

While the administrator of an ERISA vacation benefit plan would not seem to qualify as an "employer" within the definition of that term as used in the California Employees' Earnings Protection Law, a California court might hold that the plain words of the statute are not sufficient to exclude such administrator from its requirements (*cf. Stone v. Stone* (9th C.A. 1980) 632 F.2d 740, at p. 743). Conversely, the administrator, if faced with the necessity of choosing between the restrictions on tax levies provided by the California law and no protection at all against such levies, might feel obligated as a fiduciary to claim the benefits of the law on behalf of the plan participants. We submit that the preemption provisions of ERISA were specifically intended by Congress to protect plan administrators against the necessity of choosing between the clear terms of an ERISA plan and the uncertain terms of a conflicting state law.

II

The cases ruling that ERISA does not preempt state domestic relations laws are in conflict with this Court's holding in Alessi and provide no support for Appellant's position on this appeal.

Appellant asserts that "[a]ll State laws cannot be preempted by ERISA because numerous courts have allowed levies authorized by State laws against pension funds and vacation funds when it was determined that this would further an important public purpose" (Br., p. 25). The only decision of this Court cited in support of this assertion is the Court's summary dismissal of the appeal in *In re Marriage of Campa* (1979) 89 Cal.App. 3d 113, 152 Cal.

Rptr. 362 for want of a substantial federal question ((1980) 444 U.S. 1028).

The summary action in *Campa*, however, does not have "the same authority in this Court as do decisions rendered after plenary consideration" (*Metromedia Inc. v. City of San Diego* (1981) 453 U.S. 490, 500). In *Campa* the California court expressly rejected the consideration which this Court found to be persuasive in *Alessi*, saying (89 Cal.App. 3d at pp. 126-127, 152 Cal.Rptr. at pp. 369-370):

> "The Fund next maintains that section 1144 of ERISA affirms the principle that provisions of collective bargaining agreements negotiated under the aegis of the National Labor Relations Act generally supersede conflicting state law. (E.g., Teamsters Union v. Oliver (1959) 358 U.S. 283 [3 L.Ed.2d 312, 79 S.Ct. 297].) **The pension plan here purports to prohibit the nonemployee spouse from obtaining any order or other process against the Fund.** This provision, the Fund urges, must prevail over contrary California law.
>
> "**This argument is untenable in the light of Malone v. White Motor Co.**, *supra*, 435 U.S. 497 [98 S.Ct. 1185]. There the court held that the Minnesota Private Benefit Protection Act was not preempted by the National Labor Relations Act. The Court noted that ' "We cannot declare preempted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers and unions; obviously, much of this is left to the states." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289, 91 S.Ct. 1909, 1919, 29 L.Ed. 2d 473 (1971)' [..... U.S. at ....., 98 S.Ct. at p. 1190.] The court went on to say (*ibid.*): 'There is little doubt that under the federal statutes governing labor-management relations, an employer must bargain about wages, hours, and working conditions and that pension benefits are proper sub-

jects of compulsory bargaining. But there is nothing in the NLRA, including those sections on which appellee relies, which expressly forecloses all state regulatory power with respect to those issues, such as pension plans, that may be the subject of collective bargaining. If the Pension Act is preempted here, the congressional intent to do so must be *implied* from the relevant provisions of the labor statutes. We have concluded, however, that such implication should not be made here . . . .' (Emphasis in original.)

"An implication that Congress in the NLRA intended to abrogate community property and domestic relations laws which divide pensions between ex-spouses is even less warranted than the one unsuccessfully urged in *Malone*."

In *Alessi* this Court, after plenary consideration of the issues involved, expressly and in unmistakable terms rejected the interpretation of *Malone v. White Motor Co.* which the California court found to be controlling, thereby destroying whatever authority its summary action in *Campa* might have had on this appeal.

The decisions of the Ninth Circuit in *Stone v. Stone* (9th C.A. 1980) 632 F.2d 740, *cert. den.* (1981) 453 U.S. 922, and *Carpenters Pension Trust for Southern California v. Kronschnabel* (9th C.A. 1980) 632 F.2d 745, *cert. den.* (1981) 453 U.S. 922, are flawed by their reliance without critical analysis upon the *compulsion* of the summary action in *Campa*. The extent of this reliance, and of its uncritical nature, has been recently emphasized by the Ninth Circuit in its decision in *Board of Trustees of Carpenter Pension Trust Fund for Northern California v. Reyes* (9th C.A. 1982) 688 F.2d 671, where the Court said (pp. 674-675):

"In Stone, we held that a nonemployee ex-spouse such as Toni, was a participant within the meaning of

ERISA, 29 U.S.C. § 1132(a)(1)(B). This statute provides:

> (a) A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> * * * * * *
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. . . .

Id.

This conclusion was based upon the Supreme Court's summary dismissal of the appeal in *In re Marriage of Campa,* 444 U.S. 1028, 100 S.Ct. 696, 62 L.Ed.2d 664 (1980), for want of a federal question, *see Stone v. Stone,* 632 F.2d at 742. The effect of the court's summary dismissal of *In re Marriage of Campa,* 89 Cal. App.3d 113, 152 Cal.Rptr. 362 (1979), acted as a decision on the merits that is controlling on lower federal courts. *See Carpenters Pension Trust v. Kronschnabel,* 632 F.2d 745, 748 (1980) (citing, inter alia, *Hicks v. Miranda,* 422 U.S. 332, 344, 95 S.Ct. 2281, 2289, 45 L. Ed.2d 223 (1975)). Thus, the summary dismissal established that ERISA does not preempt a state's community property law as it relates to the payment of pension fund benefits. *See Kronschnabel,* 632 F.2d at 748. We concluded in *Stone,* that if ERISA permits the transfer of an employee's pension benefit rights to an ex-spouse pursuant to state community property law, then it impliedly authorizes an ex-spouse to enforce these rights pursuant to 29 U.S.C. § 1132(a)(1)(B). *See* 632 F.2d at 743. **It follows from Stone that if the non-employee ex-spouse is able to enforce his or her rights as a participant, he or she is permitted as a participant seeking to enforce these rights, the award of attorney's fees under 29 U.S.C. § 1132(g).**

The Fund seeks to cast doubt on the validity of the rationale upon which *Stone* and *Kronschnabel* are based because of the reliance placed on *Campa*. The Fund argues that we are bound by the Supreme Court's summary dismissal in *Campa* only until "'doctrinal developments indicate otherwise.'" [Citations]

Recent Supreme Court cases such as *Ridgway v. Ridgway*, 454 U.S. 46, 102 S.Ct. 49, 70 L.Ed.2d 39 (1981), *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), and *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed. 2d 402 (1981) are, according to the Fund, doctrinal developments indicating that the ERISA does preempt community property law as it relates to pension funds. None of these cases, however presents the issue of whether a state's community property law is preempted by ERISA. Two of the cases address the issue of whether state community property laws are preempted by other federal statutes: *Ridgway* involved the preemption of state community property laws by the Servicemen's Group Life Insurance Act of 1965, 38 U.S.C. §§ 765-779; *McCarty* involved the issue of whether state community property laws are preempted by federal law concerning military non-disability retirement pay, 101 S.Ct. at 2730. *Alessi* on the other hand, involves ERISA but not state community property law. 101 S.Ct. at 1898 (court addressed issue of whether ERISA preempted state law prohibiting offset of workers' compensation awards). **Because these cases do not address whether ERISA acts to preempt state community property law we are compelled to follow Campa. We hold that attorney's fees may properly be awarded in the matter before us pursuant to ERISA, 29 U.S.C. § 1132(g).**

We are cognizant of the fact that there are many questions, yet unresolved by the Supreme Court which

result from the interplay between the law of community property and the provisions of ERISA. **Review of these important issues by the United States Supreme Court would greatly assist fund administrators in meeting their responsibilities.** *See, e.g., United States v. Ross,* ..... U.S. ....., ..., 102 S.Ct. 2157, 2162, 72 L.Ed.2d 572 (1982)."

The appellant in *Reyes* filed a timely petition for rehearing and a suggestion that the rehearing be en banc. By an order filed March 9, 1983, the Court denied the petition and rejected the suggestion that the rehearing be en banc, saying:

"The cases cited by petitioner, *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California,* 679 F.2d 1307 (9th Cir. 1982) and *Alessi v. Raybestos-Manhattan, Inc.* 451 U.S. 504 (1981) are inapposite. **Neither case deals with an attempt by the state to apply community property law to pension funds.** As pointed out in the *Reyes* opinion, we are **bound** by the summary dismissal of *In re Marriage of Campa,* 444 U.S. 1028 (1980). See *Stone v. Stone,* 632 F.2d 740, 742 (9th Cir. 1980); *Carpenters Pension Trust v. Kronschnabel,* 632 F.2d 745, 748 (9th Cir. 1980). **Petitioner's arguments based on Alessi should be addressed to the Supreme Court, not this Court."**

Notwithstanding this order, we are at a loss to understand how the majority of the panel in the *Franchise Tax Board* case could consider *Alessi,* which addressed the "issue of whether ERISA preempted state law prohibiting offset of workers' compensation awards" (see *supra,* p. 19) gave it "no choice" but to hold that ERISA preempted California's attempt to levy on a vacation trust for unpaid taxes, whereas the panel in *Reyes,* without discussing or

analyzing what this Court said in *Alessi,* found both *Franchise Tax Board* and *Alessi,* "inapposite" to a determination of the issue of "whether ERISA acts to preempt state community property law." It is apparent that the *Reyes* panel believes that this Court should address the latter issue, unencumbered by any reasoned analysis by the Ninth Circuit of *Alessi's* impact upon *Campa,* and by denying a rehearing it has provided the opportunity for the appellant in that case to seek such review. We submit, however, that the absence of reasoned analysis and the continued reliance upon the compulsion of *Campa* detracts from the authority of *Stone* and *Kronschnabel* and now *Reyes.*

The domestic relations law decisions cited by Appellant are leading plan fiduciaries, participants and beneficiaries, and the federal courts, deeper and deeper into a dense thicket from which they will be extricated with difficulty and which will inevitably result in injury and loss to the persons and entities affected. The matter was succinctly expressed by Representative Erlenborn while introducing in the House of Representatives a bill entitled "The Retirement Income Incentives and Administrative Simplification Act of 1981 (H.R. 4330)," when he said (Cong. Rec.-House, July 30, 1981, p. H-5424):

> "Currently, courts are ignoring ERISA's preemption of State law with respect to community property laws and alimony and support decrees. Plans which obey court orders to pay benefits in violation of ERISA's prohibitions against assignment and alienation may be placed in tax jeopardy or found to be in violation of plan provisions."

CONCLUSION

Congress, in enacting ERISA, concluded that with the exception of the Welfare and Pension Plans Disclosure Act, the provisions of ERISA should not affect existing federal law (Section 514(d), 29 U.S.C. § 1144(d)). It came to the opposite conclusion as to state law and determined that with a few carefully limited exceptions, the provisions of ERISA should supersede that law as it relates to ERISA plans. If this decision is to be reversed or modified as to State levies on vacation and holiday benefits, the reversal or modification must be by "congressional and not by judicial action" (*Local No. 2, etc. v. Paramount Plastering, Inc., supra*).

San Francisco, California,
March 17, 1983.

Respectfully submitted,

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